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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

FREDDIE LEE TAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. May a District Court hold in abeyance a habeas corpus petition containing exhausted claims while the state prisoner returns to state court to exhaust known, but as yet unexhausted, claims.

2. May a District Court permit amendment of an abeyant petition by the addition of claims following state court exhaustion.

LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, was the petitioner in proceedings before the United States Court of Appeals for the Ninth Circuit, and is the petitioner in this Petition for Writ of Certiorari.

The United States District Court for the Northern District of California was the respondent in proceedings before the United States Court of Appeals for the Ninth Circuit.

Freddie Lee Taylor, a state prisoner sentenced to death under the laws of the State of California, was the real party in interest in proceedings before the United States Court of Appeals for the Ninth Circuit, and is respondent in this Petition for Writ of Certiorari.

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ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

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FREDDIE LEE TAYLOR, *Respondent*.

Petitioner Arthur Calderon, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir. 1998). (App. A, 1-18.)

The order of the United States District Court for the Northern District of California was unreported. (App. B, 19-50.)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 1998. Rehearing and rehearing en banc were denied on March 6, 1998. (App. C.) This Petition for Writ of Certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme

Court Rules 13.1, 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

1. 28 U.S.C. § 2254(b). (App. D.)
2. 28 U.S.C. § 2244. (App. E.)

STATEMENT OF THE CASE

On December 31, 1990, the California Supreme Court affirmed respondent Freddie Lee Taylor's (hereafter Taylor) conviction of first degree murder and sentence of death. *People v. Taylor*, 52 Cal.3d 719, 801 P.2d 1142, 276 Cal.Rptr. 391 (1990). It had denied his first state habeas corpus petition on September 26, 1990.

On June 12, 1992, nearly six years ago, the United States District Court for the Northern District of California appointed counsel for Taylor, and commenced a series of stays of Taylor's execution. Over three years later, on July 10, 1995, Taylor filed his petition for writ of habeas corpus under 28 U.S.C. § 2254, raising 46 claims, most of which were unexhausted.

The State moved to dismiss the petition for failure to exhaust state remedies. The District Court orally denied the motion at a hearing on October 20, 1995, and stated it would identify the unexhausted claims and hold the mixed petition in abeyance pending exhaustion in state court, pursuant to former Northern District Local Rule 296-8(e). Despite the District Court's statement that an order would be forthcoming, however, it issued no written ruling with respect to exhaustion, and Taylor did not return to state court.

On February 4, 1997, the State moved for reconsideration of the District Court's oral ruling. As a

basis for reconsideration, the State cited the Ninth Circuit's intervening decision in *Greenawalt v. Stewart,* 105 F.3d 1268 (9th Cir. 1997), which held that a District Court must dismiss mixed petitions rather than hold them in abeyance.

After hearing the motion for reconsideration, the District Court issued a written ruling identifying the unexhausted claims, finding 27 completely unexhausted and six partially unexhausted, and stating it would permit Taylor to delete his unexhausted claims. The District Court further stated it would hold in abeyance the amended petition containing only exhausted claims while Taylor pursued exhaustion in state court, and that, "Upon completion of state proceedings, [Taylor] shall file a second amended petition." Thereafter, Taylor amended his federal petition to delete the unexhausted claims, leaving only those that were exhausted, and filed a habeas corpus petition in state court to exhaust the remaining claims.

The State filed a petition for writ of mandamus in the Court of Appeals under 28 U.S.C. § 1651(a) to challenge the District Court's abeyance order as well as its order directing Taylor to file a second amended petition following exhaustion. The court denied the petition, and denied the State's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

Summary of Argument

This case presents significant issues that recur with ever greater frequency, in both capital and non-capital cases, concerning the adjudication of habeas corpus

petitions brought by state prisoners.[1] The issues are: (1) whether a District Court may hold in abeyance a habeas corpus petition containing exhausted claims while a state prisoner exhausts additional claims of which he was aware when he filed his petition; and (2) whether a District Court may permit amendment of an abeyant petition by the addition of claims following state court exhaustion. The issues raise important questions concerning the viability of the exhaustion doctrine and the application of the abuse of the writ doctrine.

The Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The court has also decided an important question of federal law that has not been, but should be, settled by this Court. Rule 10(a), (c), Rules of the Supreme Court of the United States.

The State's argument is a simple one. A state prisoner must exhaust his state court remedies on each of

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1. The procedural device employed by the District Court has become the norm for capital habeas corpus cases in California in which petitioners have recently had to file habeas corpus petitions to meet the one-year statute of limitations in 28 U.S.C. § 2244(d), as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (Act). Typically, petitioners will time the filing of their exhausted claims to achieve ostensible compliance with the Act's limitations period, but will accompany such a petition with a request to hold the habeas proceedings in abeyance so that the petitioner can exhaust known but as yet unexhausted claims. *See, e.g., Ashmus v. Calderon*, 977 F.Supp. 987 (N.D. Cal. 1997). In many cases, the petitioner also asks for equitable tolling of the limitations period so that he can further investigate his claims before he is required to exhaust them or so that he can complete preparation of the "exhausted claims" petition. As explained below, this procedural device, which the district courts in California have, almost without exception, allowed, has arisen because the Ninth Circuit recently disapproved local rules that had purportedly authorized district courts to stay mixed habeas corpus petitions pending exhaustion.

his claims *before* he comes to federal court, at which time he must file one, fully exhausted petition. When the petitioner files his petition in federal court, he must be prepared to litigate that petition, not some future petition. He cannot circumvent the rules requiring exhaustion by filing a habeas corpus petition containing exhausted claims and then asking the District Court to hold the petition in abeyance while he exhausts claims of which he was already aware, but withheld to avoid dismissal as a mixed petition. Nor can he avoid the abuse of the writ doctrine by later amending his abeyant petition to add newly exhausted claims.

This Court's precedents and the statutory scheme governing habeas corpus petitions brought by state prisoners have made clear that before a petitioner brings his claims to federal court, he must have taken each of his claims to state court. If a petitioner seeks to bring new claims after the filing of his initial petition, he must satisfy the limitations of the abuse of the writ doctrine. If a petitioner seeks to bring a second or successive petition under the Act, he must comply with the strict limitations on such petitions.

Notwithstanding these precedents and rules, however, the Court of Appeals, in addressing a question of first impression before it, effectively sanctioned a procedure that undermines these basic principles. The Court of Appeals' decision, which let stand the District Court's abeyance order, directly undermines the efforts of both this Court and Congress to control the proliferation of habeas corpus proceedings and, in capital cases, to reduce the ever increasing incidence of delay. The procedural device employed by the District Court, which the Court of Appeals recognized as a "relatively simple way around the . . . proscription against holding mixed petitions in abeyance pending exhaustion," should be rejected as a transparent attempt to avoid the exhaustion and abuse of the writ doctrines, and to defeat Congressional efforts to

halt the endless delay in capital habeas litigation. The cynical manipulation of the rules governing habeas corpus litigation by petitioners who seek to undo every decision and circumvent every ruling should no longer be tolerated.

Ruling Below

The procedural history of this case is protracted, but has yet to result in a petition that Taylor wishes to pursue in federal court. In June 1992, the District Court appointed counsel for Taylor and stayed execution of his sentence of death. Over three years later, in July 1995, Taylor filed his initial petition for writ of habeas corpus raising, by his own admission, numerous unexhausted claims. The State moved to dismiss for lack of exhaustion. In October 1995, the District Court held a hearing, during which it stated that it would not dismiss the petition, but would instead stay it pending exhaustion of the unexhausted claims. The stay procedure was sanctioned by former Northern District Local Rule 296-8(e)[2] and by dictum in an earlier Ninth Circuit case, *Neuschafer v. Whitley,* 860 F.2d 1470 (9th Cir. 1988). The District Court also stated that it would identify the unexhausted claims in a written order. No written order was forthcoming, however.

In 1997, the Ninth Circuit Court of Appeals issued a trio of cases which

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2. Northern District Local Rule 296-8(e) provided: "If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims."

> made it manifestly clear that both the *Neuschafer* dictum and Local Rule 296-8(e) are inconsistent with the mandate of *Rose* [*v. Lundy*, 455 U.S. 509 (1982)], and that the 'stay-and-abeyance' procedure for mixed petitions that they begot will no longer be considered a valid exercise of judicial power.

App. A at 9, discussing *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 1794 (1997), *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S.Ct. 265 (1997), and *Reutter v. Crandel*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S.Ct. 142 (1997).

In February 1997, after the first of these cases was decided, the State sought reconsideration of the District Court's 1995 oral ruling that Taylor's mixed petition would be stayed pending exhaustion after it identified his unexhausted claims. In a ruling issued on April 1, 1997, the District Court grudgingly acknowledged that its earlier decision to stay the mixed petition would no longer be permitted under the Ninth Circuit's recent authority. App. B at 31-33. However, it found a "relatively simple way around" that dilemma. It noted that the Ninth Circuit, in distinguishing one of its earlier cases in *Greenawalt*, 105 F.3d at 1274, had said that a District Court could stay a petition that it could validly consider on the merits, i.e., a fully exhausted petition. App. B at 32, 43.

Accordingly, the District Court concluded that Taylor could amend his petition to delete his unexhausted claims, that the court could then hold in abeyance the resulting exhausted petition, and that Taylor could later amend his petition to add back the claims following exhaustion. App. B at 40-46, 49-50. By this contrivance, the District Court allowed Taylor to follow the identical procedure that he would have followed under the discredited local rule, except that the stayed petition was exhausted (as amended by deletion) rather than mixed (as originally

filed). The effect on the State--and the ensuing interference with its ability to execute its criminal judgments--is of course identical.

The State filed a petition for writ of mandamus in the Court of Appeals, arguing that the District Court's order defeated the doctrines of exhaustion and abuse of the writ just as effectively as if the petition were mixed. The State argued that the District Court had two options for dealing with Taylor's initial, mixed petition. It could have dismissed the entire petition, leaving Taylor to return to state court to exhaust his unexhausted claims, or it could have allowed Taylor to delete the unexhausted claims and proceed in federal court on the remaining exhausted claims.[3] The State argued there was no authority for the option chosen by the District Court -- abeyance of an amended petition containing exhausted claims while Taylor returned to state court to exhaust the unexhausted claims, which is effectively no different from the stay of a mixed petition. The State asked that the District Court's order -- permitting abeyance of the exhausted claims petition and later amendment of the petition with newly exhausted claims -- be vacated.

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3. The State assumed, both at the time of filing its initial motion to dismiss in August 1995 and at the time of filing its motion for reconsideration in February 1997, that the District Court could dismiss Taylor's mixed petition "without prejudice" to refiling after completion of state exhaustion. The State did not argue that the Act required dismissal "with prejudice," in part because of uncertainty that then existed concerning application of amended 28 U.S.C. § 2244(b) to Taylor's case in light of his having filing a petition, albeit a defective one, before passage of the Act. By February 1997, the Ninth Circuit had ruled that the Act applied only to "cases" filed after its enactment. *Jeffries v. Wood*, 103 F.3d 827 (9th Cir. 1996); *see also Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Since Taylor chose not to take *any* dismissal, and instead chose to delete his unexhausted claims, the issue whether dismissal of his initial, mixed petition could have been "without prejudice" was never confronted.

The Court of Appeals recognized that "[t]he legitimacy of the District Court's self-titled 'procedural device of withdrawal and abeyance' presents an important and difficult question of first impression in this circuit." App. A at 4. The court noted that "[t]he 'exhaustion' doctrine has long been one of the pillars of federal habeas corpus jurisdiction," and that this Court had, in *Rose v. Lundy*, 455 U.S. at 510, adopted a rule of "total exhaustion" and directed that District Courts must dismiss mixed petitions containing both exhausted and unexhausted claims, leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the District Court. App. A at 7-8. The Court of Appeals further noted that, despite *Rose*, it had proposed an alternative procedure in *Neuschafer v. Whitley*, 860 F.2d 1470, allowing a district court to hold a mixed petition in abeyance while the petitioner exhausted his state remedies, a procedure later codified in local rules for each of California's four districts, of which the Northern District's Local Rule 296-8(e) is typical. App. A at 8.

The Court of Appeals then stated that, in the trio of recent cases noted above, it had since found the local rules and its dictum in *Neuschafer* conflicted with this Court's mandate in *Rose v. Lundy* that mixed petitions be dismissed. App. A at 9. Although the District Court conceded that the new rule in the Ninth Circuit required dismissal -- not "abeyance" -- of mixed petitions, it "discovered a relatively simple way around the *Greenawalt-Gordon-Reutter* proscription against holding mixed petitions in abeyance pending exhaustion in state court," App. A at 10, by allowing Taylor to delete the unexhausted claims and holding the amended, exhausted claims petition in abeyance, pending exhaustion and future amendment with the newly exhausted claims. App. A at 10-11.

The State argued that the District Court's procedural device was merely an end run around the exhaustion and abuse of the writ doctrines. However, in denying relief, the Court of Appeals noted that it had already concluded "'[a] district court has discretion to stay a petition which it may validly consider on the merits.'" App. A at 13-14, quoting *Greenawalt v. Stewart*, 105 F.3d at 1274. Since the District Court had discretion to consider the amended, exhausted claims petition, it had discretion to stay it. App. A at 14-16. The court based its denial of relief on the additional ground that the State could not provide supporting authority for the proposition that a district court may not stay an exhausted claims petition while the petitioner exhausts additional claims in state court. App. A at 15-16.

The Court of Appeals further concluded, contrary to the State's reading of the record, that the District Court had only "invited" Taylor to file an amended petition adding back the deleted claims after exhaustion, but that it had not indicated how it would rule on such a motion. App. A at 17. Nevertheless, the court agreed with the State's position that any subsequent amendment of a formerly exhausted petition to add newly exhausted claims could be barred as an abuse of the writ. App. A at 17, citing *McCleskey v. Zant*, 499 U.S. 467, 493-96 (1991), *Rose v. Lundy*, 455 U.S. at 520, and Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C., foll. § 2254.

On the broader dispute over the propriety of the stay-and-abeyance, the Court of Appeals conceded that there was "much force to the State's position." The court also professed to understand the State's frustration. App. A at 18. However, it declined to grant mandamus relief. *Id.*

The State sought rehearing and suggested rehearing en banc. The State argued that, consistent with the Court of Appeals' statement that the issue was one of first impression, it was not surprising that the State had been unable to cite specific authority in support of its position.

The State had asked the Court of Appeals to exercise its supervisory mandamus authority, which the three-Judge panel had found would be appropriate, App. A at 6, but which it declined to exercise. The State further argued that since the court had relied on its prior authority to deny relief, the court should rehear the case en banc. The State also argued that the court should find any future amendment of Taylor's petition with claims of which he was aware when he filed his petition to be an abuse of the writ as a matter of law and that, since the ultimate objective of the abeyance procedure (to effect belated amendment of pending petitions) was impermissible, it could not supply its justification. The court declined to grant rehearing or rehearing en banc. App. C.

Rose v. Lundy Created a Simple Rule That Has Been Thwarted by the Court of Appeals' Approval of the Procedural Contrivance Used by the District Court

A federal district court cannot review the merits of a habeas corpus petition unless all of the claims contained in the petition have been exhausted in the state courts. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. at 520. The exhaustion doctrine is based on a policy of federal and state comity, designed to give state courts the initial opportunity to correct alleged constitutional deprivations. *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

> The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated *before resort to federal court.*

Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992) (emphasis added).

In *Rose v. Lundy*, 455 U.S. at 520, this Court interpreted § 2254 to provide a "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court." The Court of Appeals understood this simple rule.

> The Supreme Court repeatedly has instructed the District Courts to dismiss "mixed" petitions containing any unexhausted claims. In *Rose v. Lundy*, 455 U.S. 509 (1982) (*Rose*), the Court wrote that "because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that *a District Court must dismiss* habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522 (emphasis added). More recently, the Court held that "[r]espondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims." *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (unanimous opinion); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.").

Greenawalt v. Stewart, 105 F.3d at 1273-74.

Rose provided two options for a petitioner whose petition contained unexhausted claims:

> [W]e hold that a District Court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the District Court.

455 U.S. at 510; *see id.* at 520. The Court of Appeals understood this rule as well. App. A at 8.

Despite the clarity of this Court's rule, however, the Court of Appeals sanctioned a procedural device that simultaneously defeated the policies underlying exhaustion and increased the burden on federal courts by explicitly providing for the filing of multiple petitions. The device does not promote timely efforts at exhaustion by state prisoners. On the contrary, it allows a petitioner to come first to federal court, obtain a stay of his sentence, obtain federal funding and counsel, file a petition that he knows does not contain all of his claims, and ask the District Court to maintain federal jurisdiction by continuing the stay and holding the petition in abeyance while he returns to state court to exhaust his remaining claims. The device not only expressly contemplates but invites the filing of a second or successive petition, in the form of an amendment to the initial petition, that contains the belatedly exhausted claims. Indeed, the expected filing of the amended petition is the very reason for holding in abeyance the first petition.

The burden on the federal courts is further increased by litigation involving the so-called abeyant petition. The parties may continue to litigate whether the claims in the abeyant petition are in fact exhausted, and, in some cases, petitioners seek discovery or other forms of relief with respect to the exhausted claims that have theoretically been stayed. *See, e.g.,* App. B at 47-48 (discovery in federal court on "abeyant" petition denied only because District Court found it went to unexhausted, rather than exhausted, claims). In the meantime, the petitioners are pursuing their state court remedies, which requires the State to defend its judgments in two forums at the same time. The procedural device not only increases the burden on both the parties and the courts, it defeats the rule that a petitioner should not come to federal court

unless and until he has exhausted his state remedies on all of the claims he wishes to raise.

The Court of Appeals rejected the State's argument that, if a petitioner chose to retain his exhausted claims in federal court, the State would be entitled to litigate them forthwith. App. A at 12-16. It relied on its earlier statement that a District Court may stay a petition which it could validly consider, and on its finding that the State could not muster contrary authority with respect to the heretofore unimaginable prospect that *Rose*'s teaching might be so easily circumvented by the procedural contrivance used here. App. A at 13-16.[4] However, *Rose* did state clearly that,

> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a *single* habeas petition.

455 U.S. at 520 (emphasis added). Obviously, when deciding *Rose*, this Court could not have contemplated that petitioners would be allowed to avoid its total exhaustion rule simply by filing multiple amended

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4. The Court of Appeals cited two cases, *Burris v. Farley*, 51 F.3d 655, 658-59 (7th Cir. 1995), and *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir. 1983), for the proposition that other circuits had allowed the abeyance of exhausted petitions. App. A at 14, n.7. Neither case is helpful. *Burris*'s suggestion that abeyance of a petition would be permissible because similar procedures are followed in unrelated civil cases ignores the exhaustion and abuse of the writ doctrines applicable to habeas proceedings and its suggestion is contrary to those doctrines. *Thompson* was decided well before *McCleskey*, and its conclusion that a district court could "leave a habeas petition dormant on its docket" pending presentation of unexhausted claims in state court is contrary to *Rose*'s mandate that exhaustion be completed on all claims before resort to federal court.

petitions, thus *increasing* the burden on federal courts, and hence did not speak directly to that issue; nor would the Court then have thought it necessary to spell out that, if a petitioner chose to amend his petition to delete unexhausted claims, he would be expected to litigate that petition rather than have it merely take up space on the court's docket. *Rose*'s silence on what could only be deemed an absurd reading of its straightforward holding hardly warrants the approval of the blatant and manipulative contrivance employed here. While the State does not suggest that a District Court has no discretion to control its docket as a general matter, it emphatically insists that a District Court lacks discretion to hold a petition in abeyance for the purpose of avoiding the exhaustion and abuse of the writ doctrines.

As this Court explained in a related context,

> The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decisions in *Rose v. Lundy*, 455 U.S. 509 (1982), and *McCleskey v. Zant*, 499 U.S. 467 (1991). Adherence to those decisions, and their prompt enforcement by the district courts and courts of appeals, will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for accommodating multiple filings.

In re Blodgett, 502 U.S. 236, 239 (1992). The Court observed that expedited review of the second petition, rather than abeyance, would have been proper. *Id.* at 239-40. It then held,

> The delay in this case demonstrates the necessity for the rule that we now make explicit. In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id. at 240. Manifestly, abeyance is the antithesis of prompt resolution. The District Court's violation of its duty here could not be more plain.

Aside from the violation of *Rose* and its progeny, the State raised the effect this procedural device has on the viability of the one-year statute of limitations in 28 U.S.C. § 2244(d). Although Taylor's mixed petition was filed before the Act was passed, the District Court did not rule on the State's motion to dismiss until after the Act's passage. The application of the statute of limitations was thus an issue with respect to any amendment of the petition, but one which the District Court did not resolve because *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), was then pending before this Court. App. B at [30-31].[5]

The issue remains significant, both for this case and the many cases in which so-called exhausted claims petitions have been filed in capital cases, accompanied by requests to hold those petitions in abeyance, a device which merely pays lip service to the filing deadline. There is little doubt that the impetus for the file-followed-by-abeyance-for-exhaustion artifice is to appear respectful of the filing deadline prescribed by the Act while indulging

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5. At oral argument before the Ninth Circuit, the State explained that the Act now applies to Taylor because his amended petition, containing only his exhausted claims, was filed on April 30, 1997, well after passage of the Act.

death row inmates' desire to pursue exhaustion of state remedies on a schedule that serves to maximize delay. Congress, however, was keenly mindful of the exhaustion requirement when enacting the deadline, and made what in *its* judgment is the *proper* accommodation. Exhaustion *tolls* the deadline, 28 U.S.C. §§ 2244(d)(2), 2263(b)(2), a feature of the law that belies any suggestion that state exhaustion, being a precondition to federal relief, would occur *after* the filing of the federal petition. Since all petitions now filed will be post-Act petitions, the procedural device employed here will also affect the statute of limitations. Petitioners who purport to meet that statute, but then ask the district court to hold their petitions in abeyance pending state court exhaustion of additional claims, defeat the very policy the limitations period was crafted to advance.[6]

The State asked the Court of Appeals to respect the simple rule of *Rose*, and to refuse to sanction a novel procedural device that undermines the holding of that case. The court declined to do so, thus increasing the burden on federal courts and disserving the values of comity and federalism that undergird the exhaustion doctrine. Both this Court's decision in *Rose* and the Congressional implementation of a statute of limitations, with its provision for tolling pending state court exhaustion, provide a fair and efficient mechanism for habeas litigants that requires the exhaustion of all claims for relief before resort to federal court. The requirement of exhaustion followed by the filing of a single petition

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6. Taylor and numerous other petitioners have argued that Rule 15, Federal Rules of Civil Procedure, allows liberal amendment and relation back of those amendments to the initial filing. Indeed, at the March 28, 1997, hearing on the State's motion for reconsideration, the District Court stated, "I think they're permitted to amend. What about Rule 15(c) and relation back?" Petition for Writ of Mandate to the Ninth Circuit, Exhibit D at 17.

should not be avoidable by the simple ruse of a procedural device that the Court of Appeals acknowledged will render the "circle . . . complete" by enabling Taylor to achieve precisely what its cases, and this Court's precedents, had previously disallowed. App. A at 18.

Permitting Later Amendment of an Abeyant Petition with Newly Exhausted Claims Violates the Abuse of the Writ Doctrine

In *Rose v. Lundy*, a plurality of this Court warned petitioners who wished to delete unexhausted claims that,

> By invoking this procedure . . . the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. . . . [A] district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ." . . . Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.

455 U.S. at 520-21. The Court's quote from *Sanders v. United States*, 373 U.S. 1, 18 (1963), is particularly instructive here.

> [I]f a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be

> true if, as in Wong Doo, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

455 U.S. at 521 (footnote omitted).

Although *Rose* spoke in terms of a "subsequent petition" rather than an amended one, 455 U.S. at 520-21, the principle of abuse of the writ applies equally to both. Amending a federal petition with the addition of new claims achieves the same result as that obtained by presenting those claims in a new petition -- it presents the federal court with new claims for relief that were not presented in the original petition, and it results in the same piecemeal litigation and delay.

In *McCleskey v. Zant*, 499 U.S. at 490, this Court stated, "[i]n habeas, equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" A petitioner who deliberately chooses to file a petition containing some claims, and who also intends to file a successive petition containing additional claims after exhaustion, is necessarily violating this Court's rule against piecemeal presentation of claims. A request for abeyance of a valid petition so that the petition may be amended in the future disentitles the petitioner to the relief he seeks in the successive petition just as it would if the first petition was adjudicated and a new, successive, petition was filed. *Cf. id.* at 498 ("Abuse-of-the-writ doctrine examines *petitioner's* conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process . . . .") (emphasis in original); *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992).

In concluding its abuse of the writ analysis in *McCleskey*, the Court stated that the history of the proceedings in that case, and the burden on the State to defend against allegations made for the first time in federal court nine years after trial, demonstrated the necessity of the abuse of the writ doctrine. *Id.* at 503. Here, the California Supreme Court affirmed in 1990 Taylor's conviction and sentence of death for the murder he committed in 1985, he has been in federal court since 1992, and he filed his first, mixed petition in 1995. He has yet to file a valid petition that he actually intends to pursue, and he wishes to further delay proceedings until he has filed a second amended petition. This case is thus far more egregious than *McCleskey*, in which the petitioner had actually prosecuted two federal habeas petitions to conclusion.

Moreover, in striking at finality, the habeas writ undermines the State's ability to articulate societal norms through criminal law. "[T]he power of a State to pass laws means little if the State cannot enforce them." *Id.* at 491; *see In re Blodgett*, 502 U.S. at 239. Similarly, the ability of the State to defend its judgments in federal court means little if the federal proceedings never come to an end. As this case exemplifies, federal proceedings that drag on for years, with defective, amended and abeyant petitions being filed, and with further amended petitions contemplated, only serve to trivialize the Great Writ.

The Court of Appeals agreed with the State that any subsequent amendment of a formerly exhausted petition to add newly exhausted claims could be barred as an abuse of the writ. App. A at 17. The court cited the plurality decision in *Rose*, 455 U.S. at 520, as well as Rule 9(b), Rules Governing Section 2254 Cases, 28 U.S.C., foll. § 2254, and *McCleskey v. Zant*, 499 U.S. at 493-96.

The court nevertheless declined to find that Taylor's contemplated amendment would constitute an abuse of the writ because it believed such a finding would be

tantamount to an advisory opinion. App. A at 17. Its determination was based on the belief that the District Court had not actually ruled that Taylor could file an amended petition, but had only "invited" him to do so, and had itself declined to issue an advisory opinion. As the State pointed out in its rehearing petition, however, the District Court's statement regarding an advisory opinion went only to the issue whether the Act applied to this case, in light of the pendency of *Lindh v. Murphy*, not whether Taylor could file an amended petition. *See* App. B at 46-47; Petition for Writ of Mandate to the Ninth Circuit, Exhibit D at 24. The District Court's order shows that it not only concluded Taylor could file an amended petition, but in fact ordered him to do so, and set a time within which the State would be required to file an answer. App. B at 39-46, 49-50.

In any event, regardless of whether the District Court had conclusively ruled that Taylor could file the amended petition, it can be determined at this stage that the anticipated amendment will constitute an abuse of the writ. Taylor has known of his unexhausted claims since at least July 1995. Having acknowledged the presence of unexhausted claims and predicated his request for a stay and abeyance on their existence, Taylor has admitted that he cannot meet the standard for excusing his failure to raise the claims at the appropriate time that this Court articulated in *McCleskey v. Zant*, 499 U.S. at 493.[7]

Having already filed his initial, mixed petition, Taylor was limited, under *Rose*, to only two options: (1) refile his petition containing only those claims he had exhausted, which could then be litigated, or (2) suffer dismissal of his mixed petition, and then attempt exhaustion of all his remaining claims in state court so that he could file *one*

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7. Any petitioner who files an "exhausted claims" petition with a request to hold the petition in abeyance pending exhaustion of additional claims will be in the same situation.

fully exhausted petition. He chose to do neither, and instead asked the District Court to allow piecemeal presentation of his claims by the filing of multiple petitions.

The District Court's grant of Taylor's request to hold the amended, "exhausted" claims petition in abeyance, so that he might later amend it with his newly exhausted claims, must be reversed. Having now filed the amended petition containing exhausted claims, Taylor must pursue it. Any contemplated further amendment with additional claims following exhaustion constitutes an abuse of the writ on its face, and that finding need not await what will inevitably be a futile exercise.

Since the ultimate objective of the abeyance procedure is impermissible, it cannot supply its justification. Petitioners who file petitions containing their exhausted claims are obligated to pursue them. The abeyance artifice that petitioners have sought violates the exhaustion and abuse of the writ doctrines. The district courts' allowance of this contrivance constitutes an invalid exercise of judicial power.

CONCLUSION

For the reasons stated, the State respectfully asks that the petition for writ of certiorari be granted.

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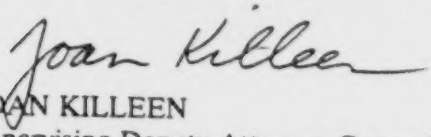

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